

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARREN MAURICE PATTON,

Defendant-Appellant.

UNPUBLISHED

October 12, 2004

No. 248608

Wayne Circuit Court

LC No. 03-000511-01

Before: Schuette, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for second-degree murder, MCL 750.317. Defendant was sentenced to 24 to 60 years' imprisonment. We affirm.

I. FACTS

In the early morning hours of May 6, 2002, a female brought the victim over to a crack house. The victim was smoking crack and after the female left, defendant and the victim began arguing over money that the victim owed defendant. The victim was deaf and could not speak and was writing messages to defendant. Defendant told the victim that he wanted his money. The victim did not give defendant the money.

People in the crack house were told to leave. As soon as the victim got outside, he began running across the street. Defendant began running after the victim. The victim went up onto a porch and defendant followed. Defendant began hitting the victim with a stool and yelling that he wanted his money. The victim got up and ran and defendant pursued. Defendant hit the victim again with a stool and his fists. At about 4:30 a.m. the police discovered the victim's body, shirtless and covered with blood.

II. JURY INSTRUCTIONS ON SELF-DEFENSE AND IMPERFECT SELF-DEFENSE

Defendant first argues that the trial court erred in refusing to give jury instructions on self-defense and imperfect self-defense. We disagree.

A. Standard of Review

Instructional errors are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002), rem'd 467 Mich 888 (2002), on rem 256 Mich App 674 (2003).

B. Analysis

A trial judge must instruct the jury as to the applicable law, and fully and fairly present the case to the jury in an understandable manner. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). The instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is evidence in support. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). When a jury instruction is requested on any theories or defenses and is supported by the evidence, the instruction must be given to the jury by the trial court. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995).

A person has the right to use force to defend himself under certain circumstances. Lawful self-defense will excuse a defendant from homicide. CJI2d 7.15(1); *People v Riddle*, 467 Mich 116, 126, 142; 649 NW2d 30 (2002). To be lawful self-defense, the evidence must show that: (1) the defendant honestly believed that he was in danger; (2) the danger feared was death or serious bodily harm; (3) the action taken appeared at the time to be immediately necessary; and (4) the defendant was not the initial aggressor. *Id.* at 119, 120 n 8. If there is proof that a defendant's belief of imminent danger was not honest or reasonable, it is sufficient to defeat a claim of self-defense. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

After a comprehensive review of the record, we find that the evidence did not support a self-defense instruction. Here, defendant was the initial aggressor. Further, defendant's own testimony negates the suggestion that he held an honest and reasonable belief that he was in imminent danger of being killed or seriously injured. Specifically, although defendant's statement indicated that the victim picked up a stick, defendant never stated that the victim attempted to use the stick against him or that he believed he was in imminent danger because the victim had the stick. Defendant struck the victim numerous times with a chair. The victim fell to the ground and was bleeding. Defendant's statement indicated that the victim had a stick he grabbed after defendant kept hitting him. Defendant continued hitting the victim's head with the chair. Even assuming that defendant was afraid of the victim wielding a stick, there was no effort made to retreat before hitting the victim repeatedly with the metal chair, and therefore, the action taken was not immediately necessary. Simply, there was insufficient evidence that defendant reasonably believed that he was in imminent danger of death or serious bodily harm. There was not sufficient evidence to support a self-defense instruction. The court did not err in failing to give such an instruction. *People v Hoskins*, 403 Mich 95, 97; 267 NW2d 417 (1978); *People v Williams*, 118 Mich 692, 698; 77 NW 248 (1898).

Imperfect self-defense is a qualified defense that may diminish second-degree murder to voluntary manslaughter. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993). Imperfect self-defense is usually invoked when the defendant would have had the defense of self-defense if he had not been the initial aggressor. *Id.* However, the argument fails on occasions where the defendant used excessive force or unreasonably believed himself to be in imminent danger. See *Id.* at 325; *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992).

Here, even if defendant had not been the initial aggressor, defendant's use of deadly force was not immediately necessary. There was no testimony by any of the eyewitnesses or any indication in defendant's statement to police that the victim fought back in any way. Further, there was uncontested eyewitness testimony that defendant hit the victim with a metal folding chair during the beating, and there was no indication that the level of force defendant used was justified. There was testimony that on the victim's glabella, which is the area of the face between the eyebrows, there was a skull fracture with actual exposure of underlying brain tissue, which indicated forceful impact with a large heavy object. The victim had at least nine separate blows to the back of the head, and at least five blows to the face area. The victim's scalp was torn and he had multiple skull fractures. Two of the wounds from the blows to the back of the head were circular and one inch in diameter, which would be consistent with a blow inflicted by a foot of the black metal folding stool. The victim had wounds on the back of the forearms and hands that are consistent with a defensive nature, with the arms flexed outward to allow him to defend himself. Thus, even if defendant had not been the initial aggressor, there was no evidence to establish that defendant's use of deadly force was immediately necessary. We find that the trial court did not err in refusing to give an instruction on imperfect self-defense.

III. MISTRIAL

Defendant next argues that the trial court erred in not granting a mistrial due to a police sergeant's unresponsive testimony. We disagree.

A. Standard of Review

A trial court's decision to grant or deny a mistrial is reviewed for an abuse of discretion. *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000).

B. Analysis

Unresponsive testimony by a prosecution witness generally does not justify a mistrial unless the prosecutor conspired with or encouraged the witness to give unresponsive testimony the prosecutor knew in advance that the witness would give that testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Police officers have a special responsibility not to venture into forbidden areas, and this Court scrutinizes the unresponsive answers of officers to be sure that the defense was not prejudiced. *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983); but see, *Hackney, supra*, 183 Mich App 531; *People v Lumsden*, 168 Mich App 286, 296-299; 423 NW2d 645 (1988); *People v Barker*, 161 Mich App 296, 305-307; 409 NW2d 813 (1987); *People v VonEverett*, 156 Mich App 615, 622; 402 NW2d 773 (1986); *People v Stinson*, 113 Mich App 719, 726-727; 318 NW2d 513 (1982).

The trial court should grant a mistrial only when the incident is so egregious that the prejudicial effect cannot be removed any other way. *People v Coles*, 417 Mich 523, 554-555; 339 NW2d 440 (1983), overruled in part on other grds *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). The test does not focus on whether there were some irregularities, but rather whether the defendant received a fair and impartial trial. *Lumsden, supra*, 168 Mich App 298.

In this case, the police sergeant had the following exchange on cross-examination with the defense attorney:

Q. You say that you went out to arrest [defendant] on a warrant. Now, that warrant was actually issued in October, the – October 18th, wasn't it?

A. I'm not sure what dates the warrants were issued.

Q. Do you have that in your report?

A. I doubt it.

Q. Well, you testified under oath that you went out there on a warrant?

A. Yes, I – yes, we arrested him on three warrants, to be precise.

During redirect examination, the sergeant's testimony continued:

Q. Okay. And defense counsel asked you about a date that a warrant was issued. I believe you said October 21st, is that correct?

A. That's what I have written down, yes.

Q. Okay. Do you know whether that was the date that this warrant, this murder case was issued, or was it the other warrants that you arrested him on as well?

In this case, there is no indication that the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999); *Hackney, supra*, 183 Mich App 531. On redirect, the prosecutor was responding to issues brought up on cross-examination and only questioned the sergeant on issues that had been addressed by defense counsel in cross-examination. Further, the trial court immediately gave a cautionary instruction that the jury not consider whether the arrest was valid because it is not part of the case. The court's response to the mistrial motion was within its discretion.

IV. ELECTRONIC RECORDING OF STATEMENTS

Defendant next argues that his due process rights were violated when the police failed to electronically record his statement. We disagree.

A. Standard of Review

A motion to suppress evidence must be made prior to trial, or within the court's discretion it can be made at trial. *People v Ferguson*, 376 Mich 90, 93-94; 135 NW2d 357 (1965). When a defendant challenges the admissibility of his statements, the trial court must hear testimony regarding the circumstances of the defendant's statement outside of the presence of the jury. *People v Walker*, 374 Mich 331, 338; 132 NW2d 87 (1965); *People v Manning*, 243 Mich App 615, 624-625; 624 NW2d 746 (2000). Defendant filed a pretrial motion to suppress his confession, however the motion did not involve this issue. Therefore, the issue has not been properly preserved. A criminal defendant may obtain relief based on an unpreserved error if the error is plain and affected substantial rights such that it affected the outcome of the proceedings, and it either resulted in the conviction of an innocent person or seriously affected the fairness,

integrity, or public reputation of the proceedings. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B. Analysis

Although defendant cites *Stephan v State*, 711 P2d 1156, 1159-1160 (Alas, 1985), in which the Alaska Supreme Court held that in order for a custodial confession to be admissible under the Due Process Clause of the Alaska Constitution, it must be electronically recorded when the interrogation is held in a place of detention and where recording is feasible, *People v Fike*, 228 Mich App 178, 186; 577 NW2d 903 (1998) is binding precedent in Michigan with regard to the subject of the admissibility of an unrecorded custodial statement made by a defendant. Under Michigan law, a defendant's right to due process is not violated by the mere failure to electronically record a police interrogation even if recording equipment is available. *Id.* at 183-185. Defendant's statement to the police did not need to be suppressed merely because it was not electronically recorded, and therefore, the admission of the statement was not improper.

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Patrick M. Meter